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No. 87-2094

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GORDON TAUB - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, and MARTHA LAYNE COLLINS, in her official capacity as Governor of the Commonwealth of Kentucky; the COMMERCE CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; CARROLL KNICELEY, in his official capacity as Secretary of the Commerce Cabinet of Kentucky; the FINANCE AND ADMINISTRATION CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; the HUMAN RESOURCES CABINET OF KENTUCKY, an agency of the government of the Commonwealth of Kentucky; E. AUSTIN, JR., in his official capacity as Secretary of the Human Resources Cabinet of Kentucky; and the STATE PROPERTY AND BUILDINGS COMMISSION OF KENTUCKY, an agency of the Commonwealth of Kentucky - - - - - - - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTER-QUESTION PRESENTED

The Respondents (Commonwealth) are dissatisfied with Question 1 presented by Petitioner (Taub) because it is incomplete, unclear and not fairly presented. In lieu thereof, the Commonwealth submits the following question presented:

1. Whether a state taxpayer, who has not suffered and will not suffer pecuniary injury, has standing to challenge the validity of a state statute authorizing the Commonwealth, after a finding of economic feasibility and public benefit, to offer economic inducements in the form of land, services, and the like to entice industrial development and to enter into contracts for that purpose, utilizing general state tax revenues to satisfy the cost of the inducements.

Question 2 presented by Taub is unnecessary as embraced by Question 1.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

The statement by Taub in his Petition is incomplete in material respects, requiring this Supplemental Statement.

The Commonwealth, like its forty-nine sovereign counterparts, is competing with its counterparts and others to attract foreign industry by offering inducements and entering into contracts. The statute assaulted provides the machinery to do so, utilizing general tax revenues for that purpose. The particular facts here, presented in proper perspective, are succinctly stated by Chief Judge Lively in the Opinion of the United States Court of Appeals for the Sixth Circuit:

> The facts are not in dispute. During the administration of the defendant Martha Layne Collins, former Governor of Kentucky, Toyota Motor Corporation (Toyota) determined to build a large automotive assembly plant in Scott County, Kentucky. As part of negotiations leading to this decision, Kentucky and Toyota entered into a contract by which the Commonwealth agreed to acquire land for the plant and to expend, or make available to Toyota, an amount not exceeding $20,000,000 for site preparation, engineering and improvements. The total cost to the Commonwealth was estimated at $35,000,000, and the improved site was to be conveyed to a designated affiliate of Toyota in fee simple at no cost. In return, Toyota agreed to construct an assembly plant at a cost of approximately $800,000,000 that would employ approximately 3,000 people.

> The agreement provided that appropriate legislation would be submitted to the Kentucky General Assembly authorizing financing of the site acquisition and improvements by the issuance of revenue bonds of the Comonwealth. The agreement contemplated that the revenue bonds would be retired from "incremental taxes," defined as property taxes on the site, state corporate income taxes, state income taxes on employees at the Toyota plant, and other revenues received by the Commonwealth that exceeded taxes collected by the Commonwealth with respect to the project site in the fiscal year immediately preceding that in which construction of the facility commenced.
>
> The required legislation was adopted by the General Assembly at its regular 1986 session, and the revenue bonds were issued and sold. The legislation provided as a condition precedent to the transfer of land to Toyota that the State Property and Buildings Commission make findings that the project was economically feasible and desirable. This requirement was satisfied by a study which calculated the incremental taxes resulting from the Toyota plant at approximately $13,200,000 per year. Following conveyance of the improved real property, Toyota began construction of the assembly plant.

[*Taub* v. *Com. of Ky.*, 842 F. 2d 912, 913-914 (6th Cir. 1988)]

Taub admits he cannot demonstrate any past, present or future pecuniary loss. In fact, the Toyota Project has been completed, has employed workers and is now producing automobiles. All indications are that

Taub, as a state taxpayer, will be benefited financially by incremental taxes from the Project reducing his taxes. The factual situation was aptly expressed by District Judge Bertelsman in his findings:

> Until the oral argument on various motions to dismiss, it was not clear that Taub was not asserting any rights as a landowner. When pressed by the court, however, Taub's counsel admitted that standing was claimed only as a taxpayer. When pressed further as to whether Taub could show any actual economic injury in the form of a past or probable future tax increase, counsel admitted that he could not and claimed no actual injury. This was apparently because Taub's annual tax bill was only $1,200.00 and if the Commonwealth's economic projections are correct, the result of its inducing Toyota to locate a plant here will cause it to reap so many benefits in the form of increased tax revenues that Taub and the rest of us will pay less taxes. Therefore, not only can Taub not show an economic detriment from these expenditures, it is equally or more likely that he will derive an economic benefit. At least he admits he can make no showing to the contrary.
>
> Taub, however, presents himself to the court as a fiscal conservative to whom public expenditures of the kind to be made here are anathema. He does not believe that government has any business expending taxpayers' money on direct grants to private enterprises, no matter how laudatory the motives.

[Pet. 18a]

It was in this setting that the Governor of Kentucky, pursuant to the authority vested in her by Chapter 56 of Kentucky Revised Statutes, entered into a Contract with Toyota Motor Corporation (Toyota) on February 25, 1986, by the terms of which Toyota argeed to construct an $800 million automobile factory at Georgetown, Kentucky, and employ therein approximately 3,000 workers, in consideration for which the Commonwealth agreed to and has furnished Toyota the plant site, certain improvements and other incidental benefits.

Taub complains that the *quid pro quo* furnished by the Commonwealth and paid for by general fund tax dollars constituted an expenditure of public money for a non-public purpose in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, citing *Citizens Savings & Loan Ass'n.* v. *City of Topeka,* 87 U.S. (20 Wall.) 655 (1875).

The record clearly demonstrates that the inducements furnished to Toyota were overshadowed by and were more than compensated for by the tax benefits to the Commonwealth under the contract. Taub did not show otherwise. The *quid pro quo* flowing to the Commonwealth was more than adequate.

The District Court dismissed Taub's Complaint for lack of standing [Pet. 17a-25a]. The United States Court of Appeals for the Sixth Circuit affirmed. *Taub* v. *Com. of Ky.,* 842 F. 2d 912 (6th Cir. 1988). Taub seeks review by this Court.

SUMMARY OF ARGUMENT

The Commonwealth entered into a good-faith arms-length contract with Toyota Motor Corporation. Tax monies from the general fund were used by the Commonwealth to furnish the consideration. The contract was for a public purpose, i.e., inducing Toyota to build an $800 million plant and employ 3,000 workers in Kentucky. The contract will generate incremental taxes far in excess of the general fund expenditures by the Commonwealth.

Taub claims standing only as a state taxpayer owning property in Kentucky. He has not suffered and will not suffer pecuniary loss.

Taub is without standing to assert that such expenditures by the Commonwealth are constitutionally infirm because not for a public purpose. One who seeks standing must show (1) that the statute is invalid *and* (2) he has sustained or is immediately in danger of sustaining direct injury as a result of the statute. It is insufficient that he suffers in common with taxpayers generally.

Taub's state taxpayer standing requirements are governed by *Doremus* v. *Board of Education,* 342 U.S. 429 (1952) and *Williams* v. *Riley,* 280 U.S. 78 (1929).

This Court expanded standing in taxpayers' actions involving First Amendment violations in *Flast* v. *Cohen,* 392 U.S. 83 (1968). In *Flast* this Court devised a new two-pronged test to determine standing only in First Amendment cases. *Flast* has no application to

state taxpayers' cases and its application is inappropriate here.

The monies expended by the Commonwealth to induce industrial development are for a public purpose. The legislative and judicial determination by the Kentucky Legislature and Kentucky's highest court are binding on this Court. The purpose will be found other than public only if the purported public purpose is palpably without reasonable foundation. A reasonable public purpose foundation exists here.

The Commonwealth as a sovereign state has the power to contract for the benefit of its citizens. The subject contract is an arms-length transaction with adequate consideration flowing in both directions. It serves a valid public purpose. Federalism and comity preclude federal judicial interference.

Conflict between the Circuits does not exist in principle. Any conflict is in the application of peculiar facts to well-settled principles and does not rise to a status warranting certiorari.

ARGUMENT

1. The Claimed Constitutional Infirmity.

Taub claims the Kentucky Statute and the implementing acts of the Governor and other officials thereunder are constitutionally infirm in that they expend public funds in aid of a private industrial enterprise not for a public purpose. Taub cites numerous cases supporting the principle that a gift of public tax funds to an industry not for a public purpose is constitution-

ally impermissible [Pet. 23]. Taub relies on *Citizens Savings & Loan Ass'n. v. City of Topeka, Id. Citizens* was decided in 1875. Two years later this Court decided *Township of Burlington* v. *Beasley,* 94 U.S. 310 (1877). The *Burlington* Court upheld an expenditure of public funds in aid of an industry as a public purpose, citing *Citizens* as controlling [94 U.S. 314]. *Hawaii Housing Authority* v. *Midkiff,* 467 U.S. 229 (1984) is this Court's latest pronouncement bearing on public purpose. The public purpose issue is relevant here only to the extent it affects standing.

2. Taxpayer Standing Requirements in General.

Taub admits and the record demonstrates that Taub has not sustained nor will he sustain any direct financial or pocketbook injury as a result of the expenditure of public funds in connection with the Toyota Project. To the contrary, the record shows that he will benefit as a taxpayer through increased tax revenues to the Commonwealth. At worst, the tax benefits to the Commonwealth from the Toyota Project may not be so bountiful as projected. In short, any loss claimed by Taub is at best speculation and surmise. His posture is the same as and in common with the taxpayers of Kentucky generally.

It would serve no useful purpose to trace the "standing" requirements from their early constitutional origin to the present. We join Judge Lively in starting with the general taxpayer standing requirements announced in *Frothingham* v. *Mellon,* 262 U.S.

447 (1923). The requirements were succinctly stated by this Court as:

> The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

[*Id.* at 488].

These requirements, based upon core federal jurisdictional principles, must be applied generally to constitutional assaults on the legislative acts of all sovereigns (federal or state) absent specific exceptions or special circumstances. None exist here.

The *Frothingham* requirements remain intact today with respect to taxpayers' actions based upon constitutional infirmities other than violations of the First Amendment to the Constitution of the United States. In *Flast* v. *Cohen,* 392 U.S. 83 (1968), this Court revisited *Frothingham* only to the extent of "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment." *Id.* at 85. This Court there formulated a new two-pronged test applicable only to First Amendment taxpayers' actions. Taub contends the *Flast* two-pronged test applies to him and he has standing. The Court of Appeals held otherwise.

The decision below is obviously sound and the Petition should be denied.

3. The State Taxpayer.

It is clear that Taub as a state taxpayer occupies the same position with his sovereign (Commonwealth of Kentucky) as did Frothingham with his sovereign (United States of America). The federalism interwoven throughout the Constitution of the United States compels a statute enacted by the legislature of one of the sovereign states be accorded the same protection given an act of the Congress of the United States. The taxing and spending statutes of the several states are as much the lifeblood of state government as the taxing and spending statutes of the Congress are essential to the federal government. They are interrelated and interdependent. The welfare of this nation is dependent on the protection of both federal and state revenue statutes from impermissible impingement by the federal judiciary.

This Court's decisions in *Doremus* v. *Board of Education,* 342 U.S. 429 (1952) and *Williams* v. *Riley,* 280 U.S. 78 (1929) govern Taub's standing. Both are state taxpayer cases and both cite *Frothingham* as controlling.

Absent First Amendment intrusion, *Frothingham* and the requirements established thereby control state taxpayer cases. Taub has no standing.

4. The Impact of Flast.

It is clear *Frothingham* controls all state and federal taxpayer standing where First Amendment im-

pingement is not asserted. The Sixth Circuit so holds and the current status of this Court's decisions clearly so indicate. Taub contends otherwise. The Opinion below is sound. *Flast* has no application.

The Commonwealth contends Taub lacks standing even under *Flast*. The District Court agreed [Pet. 18a-24a]. Judge Bertelsman noted the many decisions of this Court since *Flast* requiring a direct, distinct and palpable injury which is not abstract, conjectural or hypothetical [*Id.* 23a]. The direct injury requirement applies even in First Amendment cases [*Id.* 22a-24a]. Judge Bertelsman concluded, and properly so, that Taub was without standing even under *Flast*.

Taub did not acquire standing under *Flast* for another reason. The second nexus required by *Flast* is that the "taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the [state] taxing and spending power . . ." [*Flast*, at 102-103]. Taub did not meet the second requirement because his challenge to the subject statute (and the Toyota Project) fails to establish constitutional transgression.

The legislation assaulted, by its very terms, is for a public purpose. [Pet. 27a-45a] KRS 56.440 *et seq.* Taub simply alleges a gift of property purchased with tax dollars, citing *Citizens*. But on the motion to dismiss the record demonstrated without contradiction that the property and services paid for by tax dollars were the *quid pro quo* of an arms-length contract solemnly entered into in writing between the Common-

wealth and Toyota with more than adequate consideration flowing to the Commonwealth. So, on the motion to dismiss, operating as a motion for summary judgment, the burden was on Taub to come forward and demonstrate the necessary elements of standing. *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Taub did not carry his burden. Thus, Taub failed to demonstrate a viable claim that the assaulted statute was constitutionally impermissible.

The statute says it is for a public purpose, including employment of Kentucky citizens [Pet. 27a-45a]. The Supreme Court of Kentucky held the Statute and the Toyota Project to be for a public purpose. *Hayes* v. *The State Property and Buildings Commission of Kentucky,* Ky., 731 S. W. 2d 797 (1987). The Kentucky court's holding is in accord with this Court's decision in *Carmichael* v. *Southern Coal & Coke Co.,* 301 U.S. 495 (1936) where Justice Stone said:

> We need not labor the point that expenditures for the relief of the unemployed, conditioned on unemployment alone, without proof of indigence of recipients of the benefits, are a permissible use of state funds.

[*Id.* at 515].

This Court pointed out in *Midkiff* that legislative enactments, such as the statute under attack, are matters of legislative policy and not judicial policy. As such, public purpose, when so determined by the legislative body, is not subject to judicial invalidation as not serving a public purpose unless it is clearly estab-

lished that the asserted public purpose is "palpably without reasonable foundation" [467 U.S. 241].

It is not for this Court to determine whether the Toyota Project serves the interests of the citizens of Kentucky. The Kentucky Legislature has spoken and the Kentucky Supreme Court has decided the issue. The finding of a valid Kentucky public purpose by the Legislature and the Kentucky Supreme Court is binding on this Court. As Justice Brennan put it in *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963):

> We have no doubt that the opinion of the Supreme Court of Appeals in the instant case was intended as a full and authoritative construction of Chapter 33 as applied in a detailed factual context. That construction binds us. For us, the words of Virginia's highest court are the words of the statute.

[371 U.S. 432].

The Commonwealth has the power and duty to act and contract for the benefit of its citizens. Such is the fundamental purpose for its existence. The subject contract, made for that purpose, is well within the constitutional power of the Commonwealth. *The Ohio Life Insurance and Trust Co.* v. *Debolt,* 57 U.S. (16 How.) 416 (1853).

Taub has failed to demonstrate a viable constitutional claim upon which to base a "case" sufficient for the requisite standing.

5. Federalism and Comity.

The reluctance of the federal judiciary to intrude into the arena entrusted to the Congress flows naturally

from the separation of powers doctrine. On the same level is federal judicial intrusion into the legislative and administrative matters of a sovereign state. The interplay created by federal judicial intrusion into state taxation, state spending and state programs for the welfare of state citizens undermines the very foundation of our federalist structure. The court below expressly stated that concern. [842 F. 2d 918-919] To the authorities cited by the court below we add *Fair Assessment in Real Estate* v. *McNary,* 454 U.S. 100 (1981).

The impact of federalism and comity on the federal judiciary is not restricted to matters of state taxation. The concerns of federalism and comity extend to all functions of state government, including the state judiciary and administrative tribunals. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975); *Juidice* v. *Vail,* 430 U.S. 327 (1977); *Moore* v. *Sims,* 442 U.S. 415 (1979).

The assault by Taub upon this ambitious and highly successful effort by the Commonwealth to upgrade substantially the fiscal welfare of its citizens strikes at the very heart of self-determination by the citizens of the sovereign states. Comity compels restraint. The federal judiciary should never permit the United States Courts to be used to suppress or chill the right of the sovereign states to act for the welfare of their citizens.

6. Conflict Between the Circuits.

Taub suggests there exists a substantial conflict between the Circuits which this Court should resolve.

Taub points to *Hoohuli* v. *Ariyoshi*, 741 F. 2d 1169 (9th Cir. 1984) as creating that conflict. The *Hoohuli* court discussed *Frothingham* and *Doremus* at page 1179 and concluded, "*Flast* does not appear to have affected the availability of standing for state taxpayers challenging state statutes." This is precisely what the Sixth Circuit held. The *Hoohuli* court concluded at page 1180, "We are thus left with *Doremus* in its original form to guide us in questions of state taxpayer standing." The Sixth Circuit agrees.

The *Hoohuli* court went on to hold that "some of the individual plaintiffs" have standing because their case was a "good-faith pocketbook action." At the same time, the court held that the remaining state taxpayers, as plaintiffs, may not have had standing as state taxpayers under *Doremus* and remanded the cause for a determination.

A careful reading of the majority opinion and the dissent in *Hoohuli* clearly discloses that the conflict is in the application of the principles to the peculiar facts in *Hoohuli*. The disagreement is whether the evidence shows a sufficient good-faith pocketbook injury to the plaintiffs given standing. Factual application problems, even errors, are not conflicts of substance between the Circuits sufficient to warrant certiorari.

Taub's claim of conflict among the Circuits is also based in part on *Public Citizen, Inc.* v. *Simon*, 539 F. 2d 211 (D.C. Cir. 1976). *Public Citizen* involved a federal taxpayer's action challenging claimed constitutionally impermissive executive spending. The trial

court denied standing and dismissed. Dismissal was affirmed. No state taxpayers were involved.

CONCLUSION

Taub presents no "case or controversy." The elements lacking are (1) a viable constitutional claim and (2) a good-faith pocketbook injury. Without either there can be no standing. Without both, certiorari should certainly be denied. Taub has neither.

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